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No. 03-1684

In the Supreme Court of the United States

CRAIN BROTHERS INC. and ZURICH AMERICAN INSURANCE COMPANY,
Petitioners

V.

THOMAS LOVEJOY
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA THIRD CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

To qualify for "seaman" status under the Jones Act, a worker must satisfy the essential twofold test of (a) having duties that contribute to the function of the "vessel" or to the accomplishment of the vessel's mission; and (b) have a readily identifiable connection to a vessel in navigation (or an identifiable group of such vessels) where the connection is both substantial in duration and nature. *Chandris v. Latsis*, 515 U.S. 347 (1995); and *Harbor Tug and Barge Company v. Papai,* 520 U.S. 548 (1997).

With this benchmark established, is a worker entitled to "seaman" status and thereby the commensurate protections of the Jones Act, when the facts are undisputed that 100% of the plaintiff's duties as a welder were land-based, his injury occurred on land, and he had never been assigned to a vessel or fleet of vessels in navigation to serve as a member of a vessel's crew up to and including the date of injury? In other words, may "seaman status" be granted retroactively to the date of injury, using "post-accident" employment activities that were neither bargained for nor anticipated prior to the date of injury?

STATEMENT REGARDING PARTIES

Applicant: Crain Brothers, Inc. and Zurich American Insurance Company

Respondent: Thomas Lovejoy

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Crain Brothers, Inc. and Zurich American Insurance Company respectfully request that this Court grant this petition for a writ of certiorari to review the judgment of the Louisiana Third Circuit Court of Appeal.

OPINIONS BELOW

The Louisiana Third Circuit Court of Appeal issued an opinion dated December 10, 2003 which is reported at *Lovejoy v. Bergeaux*, 862 So.2d 490 (La.App. 3 Cir. 2003) and is reprinted and attached as Appendix A, infra at App. A-1. Applicant applied for writ of certiorari to the Louisiana Supreme Court but the application was denied, *Lovejoy v. Bergeaux*, 869 So.2d 851 (La. 2004). The denial is reprinted and attached as Appendix B, infra at App. A-15.

The trial court's written ruling dated April 30, 2003, which granted the Petitioner's Motion for Summary Judgment, is not reported. The written opinion is reprinted and attached as Appendix C, infra at App. A-17. The judgment, in accordance with the opinion was dated and signed on May 7, 2003, which is reprinted and attached as Appendix D, infra at App. A-21.

JURISDICTION

The Louisiana Supreme Court denied the application for a writ of certiorari on March 19, 2004. This petition is filed within ninety days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257.

The district court in the State of Louisiana, Parish of Calcasieu, had original jurisdiction over the plaintiff's admiralty and maritime lawsuit pursuant to LSA-Const. Article 5, Section 16, and the Jones Act, 46 U.S.C. App. Section 688 and the "savings to suitors" clause contained therein and the United States Constitution. The Louisiana Third Circuit Court of Appeal had appellate jurisdiction over the matter pursuant to LSA-Const. Article 5, Section 10 and LSA-C.C.P. Article 2083. The Louisiana Supreme Court had supervisory and discretionary jurisdiction over the matter pertaining to the application for writ of certiorari pursuant to LSA-Const. Article 5, Section 5 and LSA-C.C.P. Article 2083.

RELEVANT STATUTORY PROVISIONS

The Jones Act, 46 U.S.C. App., Section 688 is reprinted and attached as Appendix E, infra, at App. A-23.

STATEMENT OF THE CASE

The plaintiff, Thomas Lovejoy, was a land-based welder up to and including the date of his injury on July 8, 2000. He was hired by Crain Brothers, Inc. to help construct a pipeline in the coastal land areas located in the States of Louisiana and Texas.

Up to and including the date of his injury, he was performing land-based type tasks assigned to him by his welding supervisor at the job site. Up to and including the date of his injury, the plaintiff had never been assigned to serve as a master or a member of the crew of a vessel, or fleet of vessels in navigation. Up to and including the day of his

injury, the plaintiff had never been sent to sea as a master or member of the crew of a vessel, or a fleet of vessels in navigation. Up to and including the day of his injury, the plaintiff had never been assigned, either permanently or temporarily, any tasks traditionally considered "seaman-type" tasks., including tasks which would have aided in the navigation and/or transportation function of a vessel or which could be considered aiding in the accomplishment of a mission for such vessel or fleet of vessels. The plaintiff was never expected to sleep aboard or take his meals aboard a vessel or fleet of vessels in navigation. In fact, the plaintiff had never been exposed to the perils of the sea as "a seaman", nor was it ever anticipated that he would ever be exposed to such perils up to and including the date of his injury. It is wholly undisputed that up to and including the day of his injury, the plaintiff's "basic job assignment" and daily tasks had no relationship to a vessel in navigation other than that he had to travel in a boat (i.e. "water taxi") thirty to forty minutes at a time, twice per day, to a land-based job site located off of a levee in the State of Louisiana in order to weld pipe for the construction of a pipeline.

In a nutshell, plaintiff's relevant relationship with Crain Brothers, began on June 26, 2000, when he was administered a welding test as a prerequisite for employment on the Sunland/ Enterprise-Lutex pipeline project.[1] Having satisfactorily completed the welding test, he was hired and subsequently assigned to work as a land-based welder for the

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[1] It is undisputed that the plaintiff also worked for Crain Brothers on one other completely unrelated construction project, whereby no allegations of "seaman status" have been lodged.

project. Actual work on the project for the plaintiff began on July 5, 2000.[2] Plaintiff claims injury on July 8, 2000.

Thomas Lovejoy, was one of several welders assigned to the "welding" station on the assembly line. His assignment to the construction project was purely a land-based function. On the date and at the time of his injury, (as well as all the days leading up to the date and time of his injury) the plaintiff's only job assignment had been as a land-based welder. His only relationship to any vessel in naviga-

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[2] The pipeline construction work site where plaintiff sustained his injury consisted of a combination of eight sets of mats whereby pipeline rollers were mounted on mats fixed upon land (levee system), spaced approximately 40 feet apart and running in a perpendicular direction from a levee into a non-navigable marsh. Various "work stations" were staged to accomplish particularized tasks required for the configuration of the sections of pipe (individually called "joints") into the overall pipeline assembly. These work stations were set up as an assembly line whereby "welding", "sandblasting", "x-raying", "doping" and "jeeping" type tasks were to be accomplished within the overall scheme of constructing the pipeline. As the "joints" of pipe were welded, sandblasted, x-rayed, etc. thereby passing through the assembly line process, the overall pipeline construction came into being. As each individual joint of pipe was added to the overall previously completed assembly, a marsh buggy would slowly pull the assembly into the non-navigable marsh for the final stages of construction, which included "capping" and "pressure testing".

tion was the sole activity of riding in a boat to transport him and his equipment to and from the pipeline construction site located on land.[3] The boat ride to the construction site lasted approximately 30 to 40 minutes at most. The plaintiff rode the boat in the morning prior to the beginning of the day's tasks and rode in the boat again in the afternoon after the day's work. At no time, prior to the date of injury, was he required to eat, sleep, work or do anything else in relation to a vessel in navigation. He was purely a passenger upon a vessel used as a "water taxi" to and from his land-based employment.

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[3] Included in the record of the lower court attached to the original Motion for Summary Judgment are excerpts from the Plaintiff's deposition. On page 126, line 19, and following, plaintiff testified to the following:

Q. Let's take it one step at a time. What time would y'all usually get to the work site?

A. About almost 8:00 sometimes.

Q. And would y'all have any kind of like tailgate meeting or pre-gate meeting?

A. Every morning at the front office. I believe, yeah.

Q. And then did y'all take the same boat each time?

A. Different boats.

Q. Different boats. So you weren't ——your crew wasn't assigned only to the Mrs. Hilda. Correct.

A. We wasn't assigned to no boats at all. We caught what boats we needed because we had supplies on them. We had to carry supplies every two days maybe for our paint stalls. For our dope. All of our equipment. See. We had a lot of stuff. We had water cans. We had our welding equipment. We had our hoods and all of that.

The above testimony by the plaintiff was not controverted, but rather, plaintiff argued that it was the "post-accident" activities which caused the "connection to a vessel in navigation." See footnote 7.

On the morning of July 8, 2000, plaintiff and other pipeline construction personnel were transported by boat to the land-based work site. Plaintiff was at his work station by 9:00 a.m. when he was asked by the welding foreman to assist the track hoe[4] operator to walk the pipeline into the non-navigable marsh.[5] It was during this process that plaintiff was injured. It is undisputed that the accident occurred on land (i.e. dry levee) and that a vessel in navigation was not directly or indirectly involved in its occurrence in any manner whatsoever.

Following the accident, plaintiff filed suit against his employer, Crain Brothers, Inc., asserting as a theory of liability, the negligence of his employer, pursuant to the Jones

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[4] For the Court's edification, a track hoe is a piece of equipment that has components of both a bull dozer, with two sets of tracks with cleats spaced at certain intervals, and a bucket-type of device that resembles a backhoe. Just as a bull dozer is an earthmoving device, so is a track hoe. Neither of them are capable of floating upon navigable waters.

[5] At the time of the accident, the marsh buggy was on the front end of the assembled pipeline in a non-navigable marsh and the track hoe was on the rear end of the assembly located on land. The purpose of the track hoe was to help prevent the very last segment of pipe (in the overall construction) from dropping to the ground after being pulled clear of the intervening station roller as the marsh buggy pulled the entire assembly of pipe into the marsh. To accomplish this task, the pipeline construction personnel attached a sling to the pipeline, suspending the sling from a hook located on the end of the track hoe boom. The two tracks on the track hoe were positioned parallel to the pipe. The boom of the track hoe extended out at a 45 degree angle to a position directly over the pipeline. The sling on the track hoe was taught, supporting the weight of the last "joint" of pipe. Thereafter, the track hoe would move along side the pipeline assembly as the marsh buggy pulled the pipeline into the marsh.

Act.[6] Subsequent to the original filing, plaintiff amended his suit to assert a direct claim against Zurich American Insurance Company.

The defendants answered the lawsuit, specifically denying that plaintiff was entitled to any "seaman" remedies but admitting that plaintiff would be entitled to recover under either the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 901, *et seq.*) or the Louisiana State Workers' Compensation Act (LSA-R.S. 23:1021, *et seq.*) Following discovery, the defendants filed a motion for summary judgment based upon the undisputed facts as reported above. The trial court properly granted defendants' summary judgment, ruling that the plaintiff was actually a "land-based" worker, who had only a transitory or sporadic connection to a vessel in navigation. Specifically, the trial court concluded that the plaintiff's employment related connection to a vessel in navigation fell far below the thirty percent standard set forth in *Chandris v. Latsis,* 515 U.S. 347 (1995). See ruling of the trial court at App. A-17.

The plaintiff's opposition to summary judgment argued *that after he suffered his injury*, plaintiff began performing "light-duty" job tasks which could be consistent with those of a seaman.[7] At the trial court level, the plaintiff

[6] The plaintiff filed his claim for "seaman" type remedies even though he claimed and received workers' compensation benefits, pursuant to the Louisiana Workers' Compensation statute.

[7] The defendants submitted proof to the trial court, as attachments to the Motion for Summary Judgment, that the plaintiff spent approximately 37 hours out of a total of 245 hours of work, performing activities related to a vessel, i.e. the transitory and sporadic activity of riding in a boat to and from the work site. While time spent purely as a passenger on a boat does not accrue toward seaman status, *Offshore Co.*

improvidently argued that *Chandris* and other case law, has migrated away from the "snapshot" view of a seaman's employment related connection to a vessel in navigation, thereby opening the door for the inclusion of "post-accident" employment activities as viable facts for a jury to consider in determining seaman status. The trial court did not agree with the plaintiff's arguments that including "post-accident" employment related activities is an appropriate factor in determining seaman status under the facts of this case. Specifically, the trial court stated:

> *The plaintiff's attempt to stretch this rationale to include his activities after his injury requires a*

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footnote 7 continued
v. Robison, 266 F.2d 769, (5th Cir. 1959) citing *Texas Company v. Savoie*, 240 F.2d 674 (5th Cir. 1957), *rehearing denied*, 242 F.2d 667, 668, *cert. denied* 355 U.S. 840 (1957); even if it did, the undisputed facts show that the plaintiff's connection fell far below the 30% threshold set by *Chandris*. See written ruling, App.A-17.

In response to the proof submitted in the Motion, the plaintiff argued that as a matter of law, "post-accident" employment related activities were to be considered as potentially satisfying the "employment related connection to a vessel" element of "seaman status." The plaintiff suggested that if the "seaman-type" post-accident employment activities were considered, the plaintiff's "connection to a vessel" work time would increase to approximately 43%, thereby creating an issue of fact defeating the Motion for Summary Judgment. The trial court concluded, however, that as a matter of law, "post-accident" employment related activities would be not fit the overall scheme of the Jones Act. Since the plaintiff's "pre-accident" connection to a vessel in navigation was neither substantial in duration and nature, the trial court granted the summary judgment.

As a result, the plaintiff filed an appeal to the Louisiana Third Circuit Court of Appeal, solely on the issue of law, and specific to whether or not "seaman-type" post-accident employment activities were required to be considered. The Court of Appeal, based upon an improper question of federal law, reversed the trial court's judgment.

> *leap of legal logic which would subvert the purpose of the Jones Act. This would allow someone who had no connection with Jones Act activities who was injured on the job to retroactively claim Jones Act status if he were assigned to a seaman's duties after his injury. Such an analysis would lead to absurd results unintended by the Jones Act and general maritime law.* See trial court ruling, See App.A-17.

The Louisiana Third Circuit Court of Appeal, however, on the sole issue of law, [i.e. the relevance of "post-accident" employment related activities] held that the "connection to a vessel in navigation" element of "seaman status" included consideration of employment related activities which were performed after the plaintiff's injury occurred. Essentially, the Court of Appeal held that a worker could be granted "seaman status" retroactively back to the date of injury, even though the worker was land-based at the time of his injury.

As a result, the Court of Appeal reversed the trial court's granting of the summary judgment and remanded the lawsuit back to the trial court for trial on the merits.[8] In response to the reversal and remand, the defendants' filed a

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[8] The plaintiff assigned a single error in his appeal to the Louisiana Third Circuit Court of Appeal, and that error is very narrowly drawn, to wit:

> *The trial court erred in holding that the plaintiff-appellant, Thomas Lovejoy is not entitled to seaman status as a matter of law, basing its decision on consideration only of the period of time from the beginning of his employment on the project to which he was assigned to the date of his injury rather than considering the entirety of and the total circumstances of his employ-*

writ application to the Louisiana Supreme Court, noting that the Court of Appeal decision was based upon an obvious error in federal law. Unfortunately, the application for writ of certiorari was denied.

The sole issue presented herein is whether or not an essentially land-based worker, who had never enjoyed an assignment to a vessel, (or fleet of vessels) in navigation is entitled to the protections of the Jones Act by claiming "seaman status" retroactively back to the date of his injury by asserting the existence of "seaman-type" post-accident employment activities.

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footnote 8 continued

> *ment from the beginning of his employment on the project to the time he left the project and his employment with Crain Brothers, Inc., as mandated by Chandris v. Latsis (citations omitted). [quotation directly from the plaintiffs' Brief]*

See *Lovejoy*, 862 So.2d at 491, paraphrasing the plaintiff's assignment of error.

Due to the plaintiff's narrowly tailored "assignment of error", he has effectively abandoned all appealable issues in this matter, except for the trial court's refusal to consider "post-accident" employment related activities as relevant to determining seaman status. Issues not raised by an assignment of error and thereby briefed by the appellant are considered by the court of appeal as abandoned. See Uniform Rules – La. Ct. Of App. R. 2-12.4 and Rule 1-3; *Nichols v. Allstate Ins. Co.*, 765 So.2d 1017 (La. 2000); *Boudreaux v. LA DOT*, 815 So.2d 7, 12 (La. 2002); and *White v. GMC*, 775 So.2d 492, 503 (La. App. 1st Cir. 2000). Furthermore, as a result of the prior procedural stance taken by plaintiff, the prior rulings of the trial court and the Court of Appeal are the "law of the case." See *Louisiana Land & Exploration Co. v. Verdin*, 681 So.2d 63 (La.App. 1 Cir. 1996) at 65, *writ denied* 692 So.2d 1067 (La.1996) *writ denied* 520 U.S. 1212 (1997) discussing the "law of the case" doctrine in Louisiana. *Deselle v. Lafleur*, 865 So.2d 954 (La.App. 3 Cir. 2004); *Shaffer v. Stewart Construction Co.*, 865 So.2d 213 (La.App. 5 Cir. 2004).

REASONS FOR GRANTING THE PETITION

Congress, in passing the Jones Act in 1920 granted to an employee working as a seaman, a cause of action in damages as a result of the negligence of its employer. However, in doing so, Congress failed to define the term "seaman." As a result, the admiralty courts, both federal and state, were relegated to their own precedent and device in determining the broad categories of maritime workers that may be considered "seaman." The path to consistency and predictability has been defined by some writers as a "labyrinth." *Chandris* at 358. However, as the years have passed, the Court of Appeals within the various circuits have addressed a myriad of issues as the multitude of variations of "seaman status" came to the forefront. These decisions involve many sub-issues like "what is a vessel"; "what is a 'special purpose' vessel"; "when is a vessel 'in navigation'"; "when is a maritime worker connected, more or less to a vessel in navigation"; or "what constitutes a fleet of vessels" etc.? These issues have been discussed, tested and when necessary resolved by this Court. Due to the "savings to suitor's clause," 46 U.S.C. App. 688, even the state courts have been in the fracas.

Fortunately, on occasion, this Court has given needed guidance, soothing some of the uncertainty. This case presents an opportunity once again for such needed guidance to define that which Congress has ultimately relegated to this Court. "Seaman status" is a living and breathing doctrine and this Court must continue to persevere and determine its DNA.

Through thick and thin, and with almost 100 years of jurisprudence passed since the enactment of the Jones Act, this Court, has narrowed down the meaning of seaman to basically two essential elements, to wit: A seaman is an

employee whose (a) duties must contribute to the function of the vessel or to the accomplishment of its mission; and, (b) the employee must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and nature. *Chandris v. Latsis*, 515 U.S. 347 (1995) at 368 ; *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548 (1997) at 554.

The formulation of this test contemplates a "connection to a vessel in navigation" whereby that connection is substantial in duration and substantial in nature. Once again, with the case at bar, the law of "seaman status" is faced with a peculiarity that has arisen in its evolution. However, contrary to the confusion which has been characteristic of past review, the question before this Court today is more elementary; yet just as important!

I. CHANDRIS v. LATSIS

The question before this court pertains to "timing." For courts to judicially evaluate the "seaman status" of an injured maritime worker based upon the unique history of his employment, each element of "seaman status" must come together at the same time, i.e. at the time of the injury! What are the elements to seaman status? They are identified in the test set forth in *Chandris*. (1) There has to be a vessel; and, (2) the vessel has to be in navigation.[9] Also, the maritime

[9] See *Caruso v. Sterling Yacht and Shipbuilders, Inc.*, 828 F.2d 14 (11th Cir. 1987) (enbanc), *rehearing denied*, 833 F.2d 1021, holding that plaintiff was not entitled to Jones Act remedies including maintenance and cure because at the time of the injury, the vessel had not been through sea trials; thus was not yet in navigation; *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187 (1952), *rehearing denied* 342 U.S. 934; and *Boyd v. Ford Motor Company*, 948 F.2d 283 (6th Cir. 1991) holding that ship has to be in navigation "at the time of his injury"; Lastly the vessel can not be in a non-navigable waterway (land-locked lake), *Stanfield v. Shellmaker, Inc.* 869 F.2d 521 (9th Cir. 1989).

worker has to have a connection to that vessel (or an identifiable fleet of vessels), while the vessel(s) is(are) in navigation.(emphasis added) [10] Under this rule of law, a worker must be "vested" with seaman status to claim benefits pursuant to the Jones Act. The converse is likewise of import to his employer; if he fails the seaman status test there is no "vested" right to proceed against his employer in tort. Congress was deliberate in its legislation that set out the scheme of remedies available to injured maritime workers (i.e. longshoremen, seaman and other maritime workers) when it enacted the Longshore and Harbor Workers' Compensation Act in 1927.[11]

Seaman status is not merely a temporal concept,....however, it necessarily includes a temporal element. *Chandris,* at 371. In fact, timing, although not the only element, is crucial in the determination of "seaman's status" across the board. In other words, from a timing sense, when is a maritime worker vested with Jones Act protections? This Court in *Chandris v. Latsis*, created a need for a temporal test as both essential phases of the Chandris "sea-

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[10] The threshold issue before the Court is the timing of the injury in relation to when the elements of "seaman status" come together. Although Chandris did not specifically hold that the elements must all come together at the time the injury occurred, it is certainly implied. In *Fisher v. Nichols*, 81 F.3d 319 (2nd Cir. 1996) the court addressing the duties of a professional yacht captain, "The Obsession", specifically stated (citing Chandris) "The first component (of Chandris) examines the plaintiff's employment at the time of the injury and requires that the 'employee's duties...contribute to the function of the vessel or to the accomplishment of its mission." 81 F.3d 319 at 321.

[11] See 33 U.S.C. 904(a).

man status" test contain temporal elements.[12]

One of the suggestions to this Court, in *Chandris* when addressing the question of "seaman status" was the use of a bright line "voyage test." However, Justice O'Connor discounting the theory when writing for the majority, wrote;

> *It is well settled after decades of judicial interpretation that the Jones Act inquiry is fundamentally status based: land-based maritime workers do not become seaman because they happen to be working on board a vessel when they are injured, and seamen do not lose Jones Act protection when the course of their service to the vessel takes them ashore. Chandris, at 361.*
>
> *The fundamental purpose of the substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection with a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea. Chandris, at 368.*

If the Court had adopted the "voyage test", [which it did not] in some circumstances, the result would have been a

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[12] Both portions of the Chandris test contain elements of time, because a court must determine how broad a time period to consider in evaluating both an employee's duties and his or her connection to a vessel in navigation. See *Shade v. Great Lakes Dock & Dredge Company*, 154 F.3d 143 (3rd Cir. 1998), *cert. denied*, 526 U.S. 1004 (1998) at 148.

"snapshot" view of the maritime worker's activities. In affect, the seaman would be in the precarious position of walk(ing) into and out of coverage (Jones Act coverage) in the course of his regular duties, citing *Barrett v. Chevron, U.S.A., Inc.* 781 F.2d 1067 at 1075 (5th Cir. 1986) (en banc). Rather, the majority opted out of that limiting view, stating that "a more enduring relationship is contemplated by the jurisprudence", Chandris at 363 (emphasis added). It is the "enduring relationship" and the meaning of that terminology that is the root of the question of admiralty law now before this court.[13]

A. Limitations to the Broad Brush of Chandris

The motivation behind the broad stroke of the *Chandris* brush in viewing "seaman-type" activities is easily discernable. The Jones Act is designed to protect a class of maritime workers (that are seaman) from the very perils and hazards that set them apart from ordinary land-based workers.[14] "A seaman is a mariner who lives his life upon the sea", see *McDermott International, Inc. v. Wilander,* 498

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[13] This aspect of *Chandris* has already been pondered by legal theologians. "Thus, the *Chandris* majority rejects the "snapshot" approach in favor of some kind of videotape approach." See Jack L. Albritton and David W. Robertson, *Seaman Status after Chandris, Inc. V. Latsis*, 8 U.S.F. Mar. L.J. 29 at 66. "However, it is not entirely clear as to what period of time the video should cover."

[14] The types of peril discussed historically in the context of the Jones Act include deep water, wind and weather, tides and currents, ocean predators, great distances from shore, relative isolation, and inaccessibility of shore-based facilities aid and succor and above all the risks attending to the movement of vessels on navigable water. See David W. Robertson, *A New Approach to Determining Seaman Status*, 64 Tex. L. Rev. 79 (1985) at 80-81.

U.S. 337 (1991) at 349, citing *Warner v. Goltra*, 293 U.S. 155 (1934) and with that life certain risks associated thereto come into reality. The *Chandris* Court simply expounded upon the concept that if a maritime worker is faced day in and day out with those types of perils associated with the life of a seaman, it is reasonable to view all of his activities in determining whether or not he is entitled to those protections on the date of his injury. In other words, was the particular maritime worker performing functions that have been viewed as traditional seaman activities? *Wallace v. Oceaneering International,* 727 F.2d 427 (5th Cir. 1984). Has this particular maritime worker been more or less permanently assigned to a vessel, even a special purpose vessel and were his activities the types of activities which fulfill the mission of the vessel? *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959) at 779.

The converse should also be true. If up to and including the date of injury, the maritime worker is not engaged in traditional seaman activities and does not satisfy any semblance of having a "connection" to a vessel, then the maritime worker is not and should not be entitled to the protections provided to seaman by the Jones Act.[15]

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[15] One can easily envision a scenario where consideration of "post-accident" employment related activities for determination of seaman status would work to the disadvantage of a maritime worker. In the case at bar, the plaintiff's argument is that because he established a "connection to a vessel in navigation" after the accident, the percentage of his work spent on or about the vessel was increased arguably to an amount sufficient to satisfy the thirty percent rule of thumb approved by this Court in Chandris.

Hypothetically, if this Petition is not granted, and if the holding in *Lovejoy* became an established admiralty rule, a disincentive would be created for employers who have historically allowed a seaman to remain

B. Temporal Elements are Self-Evident

Historically, the Jones Act and the cases interpreting it, have never taken the view that "post-accident" activities would be considered in determining seaman status. Early decisions from this Court, have made clear that a maritime worker claiming Jones Act seaman status must have the requisite elements sufficient to be granted seaman status "at the time of the injury." This Court, in *South Chicago Coal and Dock Company v. Bassett*,[16] 309 U.S. 251 (1940) at 260, while interpreting the word "crew" contained in the context of the Longshore and Harbor Workers' Compensation Act, looked to the "actual" duties of the maritime worker at the time of the injury sustained, rather than what one might

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footnote 15 continued

on board during "light-duty" work status. With *Lovejoy* as the backdrop, after an accident, employers would have a definite incentive to take seaman off of a vessel, bring them back into "land-based" job assignment, with the intent of reducing the worker's "connection to a vessel" percentage [possibly below the thirty percent threshold], thereby creating an argument that retroactively these workers were not seaman, back to the time of the injury. This would be entirely contrary to the overall scheme of the Jones Act to protect maritime workers who meet the seaman test "at the time of injury."

[16] Admittedly, the holding in South Chicago Coal and Dock Company, has been abrogated by *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991). The discussion relevant to this Petition is the timing framework for determining the applicability of when a maritime worker is, or is not a seamen. The abrogation of the decision does not negate this narrow concept.

expect or anticipate a crew member to be performing.[17]

Similar support is gleaned from this Court's consideration of the obligation of maintenance and cure. In *Aguilar v. Standard Oil Company of New Jersey*, the obligation of maintenance and cure was considered, or at least described by the Court, as an implied provision in contracts of maritime employment.[18] See *Aguilar*, 318 U.S. 724 (1943) at 730. Following the line of thought that seaman's remedies may be viewed as an implied element of a contract for maritime employment, it would be self evident that the vesting of such rights would be based upon the status of the maritime worker at the time of the injury rather than retroactively established by activities that come into being after the fact.[19]

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[17] Terminology from the Longshore and Harbor Workers' Compensation Act has often been the source of information used by this Court and others in interpreting the Jones Act. See *Senko v. La Crosse Dredging Corporation*, 352 U.S. 370 (1957).

> This Court, however, has held that the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (citations omitted) restricts the benefits of the Jones Act to "members of the crew of a vessel." To recover, therefore, petitioner had to be a member of a crew, as that term is used in the Longshoremen's Act, ***at the time of the injury***. (Emphasis added)

[18] For purposes of comparison, the analysis in Aguilar discussing maintenance and cure may be logically extended to the case at bar under the Jones Act. See *Hall v. Diamond M Co.*, 732 F.2d 1246 (5th Cir. 1984).

[19] To be eligible for maintenance and cure, a seaman must be "in the service of his ship" at the time of the illness or injury. *Nelson v. Research Corporation of the University of Hawaii*, 805 F.Supp. 837 (D. Hawaii 1992) at 853, citing *Aguilar*.

This Court, in *Desper v. Starved Rock Ferry Co.*, 342 U.S.187 (1952), *rehearing denied* 342 U.S. 934, in the context of a Jones Act dispute appeared to address the vesting and timing question of seaman status squarely. The deceased victim, Thomas Desper, was killed after performing land-based work on a group of vessels that were generally navigable during the summer months, but at the time of the accident were laid up for winter. Of importance, was that the victim had worked as a seaman for the Starved Rock Ferry Co. during previous summers and it was anticipated that he would have worked as a seaman again in the coming months, had he lived. However, he was killed while working on or about the vessels prior to actually beginning his summertime "seaman" activities.

The critical question in *Desper*, was whether or not he was a seaman at the time of his death. In answering the question and writing for the majority, Justice Jackson reasoned;

> The many cases turning upon the question whether an individual was a 'seaman' demonstrate that the matter depends largely upon the facts of the particular case and the activity in which he was engaged at the time of injury.....To be sure, he (Desper) was a probable navigator in the near future, but ***the law does not cover probable or expectant seamen, but seamen in being.***
>
> .....
>
> The fact that he had been, or expected in the future to be, a seaman does not render maritime, work which was not maritime in its nature. 342 U.S. at 190 (Emphasis added)

In other decisions this Court has addressed, if only in dicta, the timing of a maritime worker's activities in deciding seaman status. In *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991) this Court stated, "the key to seaman status is employment-related connection to a vessel in navigation....It is not necessary that a seaman aid in navigation, but ***a seaman must be doing the ship's work***" citing Wilander 498 U.S. at 355.

It does not seem logical to adjudicate a worker to be performing the "ship's work" if the connection to the ship does not come into existence until after the accident.[20]

C. "Timing" of Seaman Status in the Court of Appeals

Whenever the temporal connection to a vessel in navigation has been addressed by the Court of Appeals for the various circuits, prior to *Chandris*, the law and the result has always been consistently clear. For "seaman status" to attach, the essential "connection to a vessel in navigation" must be in place at the time the injury is sustained.

This Court has recognized the United States Court of Appeals for the Fifth Circuit, as the leader in Jones Act jurisprudence because it reviews more seaman's cases than any other circuit. Chandris, at 365. The law in the Fifth Circuit follows the logic of the discussion above, i.e. that for

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[20]See also *Heise v. Fishing Co.*, 79 F.3d 903 (9th Cir. 1996) at 906, "the fact that if Heise performed well he might be hired to work on the ship when it left Seward if there were jobs available does not change his land-based status ***at the time injury occurred***, citing in *Shade* 154 F.3d 143. Emphasis added.

a Jones Act claim to survive, the worker has to be a "seaman" at the time the injury occurred.[21] The Fifth Circuit affirmed an opinion of the district court on that very topic. *Ramos v. Delmar Systems, Inc.*, 596 F.Supp.1105 (W.D. La. 1984) *rev'd on other grounds* at 750 F.2d 389 (5th Cir. 1985).[22] A review of *Ramos*, establishes that the Louisiana Third Circuit Court of Appeal's decision in the case at bar is clearly in conflict with the prior rulings of this Court (*Desper*) and the various circuits of the United States, including the Fifth Circuit Court of Appeals, on a question of admiralty law and on the "timing" aspect of "seaman" status.

In *Ramos*, the trial court entered a summary judgment in favor of the employer dismissing an anchor handler's Jones Act claim. A career anchor handler, Johnny Ramos ("Ramos") was hired by Delmar Systems to begin, promote and manage the company's new venture into the anchor handling business. Apparently, Ramos with years of experience in the business, had the contacts to attract customers and supervise the performance of the work. During his very short tenure with Delmar, Ramos made sales calls, hired personnel, and generally was in the process of getting the new venture "off the ground." However, because no anchor handling jobs had actually begun, Ramos had not made his first trip offshore for Delmar at the time his injury occurred.

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[21] *Ramos v. Delmar Systems, Inc.* 750 F.2d 389 (5th Cir. 1985).

[22] The Fifth Circuit affirmed the granting of the summary judgment, citing *Guidry v. South Louisiana Contractors, Inc.*, 614 F.2d 447 (5th Cir. 1980) *rehearing denied*, 616 F.2d 568. However, it reversed the dismissal of the state law claims with prejudice and remanded back to the district court.

Ramos sustained catastrophic injuries when he was rendered a quadruple amputee by electrocution when moving a compressor in the company's shop. He filed suit claiming that he was a Jones Act seaman. The district court, however, concluded that although there was no question that Ramos would have eventually performed anchor handling duties aboard a vessel or any number of vessels, the crucial inquiry for the trial court was whether or not Ramos was a seaman "at the time of his injury". In citing *Desper v. Starved Rock Ferry Co*, the trial court stated:

> *The crucial inquiry is whether the plaintiff was a seaman at the time of his injury. As stated in Desper v. Starved Rock Ferry Co., (citations omitted) the [Jones Act] does not cover probable or expectant seaman, but seamen in being. The test in the Fifth Circuit for seaman status under the Jones Act was first established in Offshore Company v. Robison, (citations omitted). Even allowing the more expansive reading of the Robison test this court concludes that there is no reasonable evidentiary basis to support a jury finding that the plaintiff was a seaman and member of a crew of a vessel under the Jones Act. The plaintiff in this case had no pending assignment to a vessel at the time of injury, nor had he ever had any assignment to a vessel during the course of his employment for Delmar.*
>
> 596 F.Supp. at 1106.

The Fifth Circuit is not standing not alone in its interpretation and utilization of *Desper* in concluding that temporally, seaman status is determined "at the time of injury."

The other circuits, as well as the district courts [that have reported opinions on the question], have universally and consistently followed the "timing rule" discussed in *Desper*. In some of those instances, the question was raised in the context of "navigability." Similar to Ramos, the rule of law has been that the question of "navigability" when determining "seaman status" is relevant at the time of injury and not afterward.

Thus, in *Stanfield v. Shellmaker, Inc.*, 869 F.2d 521 (9th Cir. 1989) the holding supports the proposition argued herein, i.e. that all elements of "seaman status" including the plaintiff's connection to a vessel in navigation must occur simultaneously. The plaintiff in Stanfield was a dredge engineer who was assigned to a dredge, "Traveler." Even though there was no dispute that the dredge was a "vessel", that the plaintiff was injured while doing the "ship's work" and that the shipowner was negligent in causing the plaintiff's injuries, the plaintiff's Jones Act claims were dismissed because the Traveler was not in navigable waters "at the time of the injury."

The fact that, in different periods of employment, (the plaintiff) worked on other vessels of Shellmaker that were located on navigable waters, did not deter the holding that the plaintiff was not a Jones Act seaman at the time of the injury.

> There is no difficulty herein finding a 'more or less permanent connection' to a vessel (citations omitted). The connection is to the vessel Traveler, and "***it was not in navigation on navigable waters at***

the time of Stanfield's injury." (Emphasis added). 869 F.2d at 525.[23]

The United States Court of Appeals, Sixth Circuit addressed a question of "timing" in *Petersen v. Chesapeake and Ohio Railway Co.*, 784 F.2d 732 (6th Cir. 1986) whereby the court directly addressed "vesting" of Jones Act entitlements claimed by a maritime worker in the context of a statute of limitations argument. In *Petersen*, the issue before the court pertained to an asbestos related illness. The maritime worker claiming Jones Act seaman status had long quit working as a maritime worker but developed asbestosis following his tenure as a marine mechanic.

The Sixth Circuit had two questions before it, to wit: (1) When did a claim for asbestosis accrue; and (2) what was the proper time period to be considered for purposes of determining plaintiff's Jones Act seaman status. Citing long standing Sixth Circuit authority, the court concluded that for purposes of the statute of limitations pertaining to the asbestosis condition, the time period was when did the plaintiff know or when should he have known of his condition. For purposes of deciding the Jones Act claim, the pertinent question was whether or not the worker was a seaman at the time of his injury, i.e. the time period in which he was exposed to asbestos fibers. 784 F.2d at 739. The essence of this holding is that seaman status is determined at the time of exposure (injury).

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[23] See also Waguespack v. Aetna Life and Casualty Company, 795 F.2d 523 (5th Cir. 1986) at 526, stating "to be a seaman entitled to bring suit under the Jones Act, plaintiff **must have worked** as a member of the crew" clearly indicating in the past tense, that at the time of his injury, the seaman's status must have been pre-established by his tenure with a vessel in navigation.

An exhaustive search of the pertinent decisional law of this Court, as well as the various courts of appeal, many of them cited herein, has revealed no authority which remotely suggests that the determinative time frame for purposes of establishing Jones Act seaman status, is not the time of the injury.

II. LOUISIANA COURT OF APPEAL COMMITS ERROR

In the case at bar, the Louisiana Third Circuit Court of Appeal has issued a ruling wherein the plaintiff may establish seaman status using "post-accident" employment related activities to illustrate the "connection to a vessel in navigation", i.e. a decision based upon the "timing" of the Jones Act seaman determination. When *Lovejoy v. Bergeaux* was lodged with the Louisiana Third Circuit Court of Appeal, it was called upon to review a ruling of the trial court, based purely upon a question of federal admiralty law, i.e. does *Chandris* expand the factors which are relevant to determining "seaman status" beyond the time frame of the date of the injury. In concluding that "post-accident" employment related activities may be used to determine seaman status, the Louisiana Third Circuit Court of Appeal decided the question in a way which is in direct conflict with the decisions of this Court, in *Chandris*, as well as *Desper*, *Harbor Tug* and *Aguilar v. Standard Oil* and other appellate courts sitting in admiralty as discussed hereinabove.

A. Temporal Elements Contained in *Chandris*

In summary, *Chandris* has held that courts should not consider an employee's entire work history when determin-

ing seaman status, but must consider only the nature of the employee's "basic job assignment" as it existed at the time of the injury, clearly noting that when a maritime worker's basic assignment changes, his seaman status may change as well. Thus, "while a court must not concentrate exclusively on the employee's specific activity at the time of the injury, nor the specific location whereupon the injury occurred, a court should limit its examination of the employee's duties to the employee's basic job assignment as it existed at the time of injury."[24]

Essentially, this Court, in Chandris, directed courts to look at "seaman status" with a wide angle lens, concluding that the *essence* of a seaman is not based upon where the maritime worker was standing (location, on or off the vessel) when the injury occurred, nor is it based upon the specific activity engaged in at the time of the injury. However, there is nothing in *Chandris,* or any other decision of this Court which would remotely suggest that "post-accident" employment related activity, may be used to retroactively vest a maritime worker with "seaman status" when there is nothing in his overall "basic job assignment" that would support the notion that he had an "established" connection to a vessel or fleet of vessels in navigation at the time of the injury. The concept of "substantial in both duration and nature" as stated in *Chandris* meant look at the essence of the maritime

[24] *Shade v. Great Lakes Dredge & Dock Company*, 154 F.3d 143 (3rd Cir. 1998) at 150 paraphrasing and citing *Chandris*. This opinion provides a very well articulated discussion comparing the maritime worker's job duties at issue when the injury occurred and the broader concept of looking at the overall basic job assignment which existed at the time of the injury. For instance, a "job duty" may be considered short term as individually directed by a supervisor, while an overall basic job assignment takes into consideration the broader picture of whether or not this maritime worker will have the essence of a seaman.

worker's employment and view his overall "basic job assignment" to determine whether or not he is a seaman. *Chandris* provided no authority to a lower court to look into a crystal ball to determine whether the maritime worker may become a seaman in the future and thereby vest in that maritime worker, retroactively, "seaman status." As stated by the trial court in *Lovejoy*, such a result is an illogical extension of *Chandris*. App. A-19. Precisely, it is this illogical ruling by the Louisiana Third Circuit Court of Appeals which is sought to be reversed herein.

B. Posture Is Ripe for Reversal

The plaintiff limited its assignment of error in the Court of Appeal, effectively conceding that "but-for" the consideration of "post-accident" employment related activities, the trial court was correct in its ruling that the plaintiff was not a seaman. The State of Louisiana, in adopting LSA-C.C.P. Art. 966 in its present form[25] has largely followed the

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[25] This is the entire test of LSA-C.C.P. Art. 966, which is Louisiana's authority for granting a Motion for Summary Judgment.

Motion for Summary Judgment; procedure

A. (1) The plaintiff or defendant in the principal or any incidental action, with or without supporting affidavits, may move for a summary judgment in his favor for all or part of the relief for which he has prayed. The plaintiff's motion may be made at any time after the answer has been filed. The defendant's motion may be made at any time.

(2) The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by Article 969. The procedure **is favored** and shall be construed to accomplish these ends.

standard set forth by Rule 56 (c) of the Federal Rules of Civil

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footnote 25 continued

B. The motion for summary judgment and supporting affidavits shall be served at least fifteen days before the time specified for the hearing. For good cause, the court shall give the adverse party additional time to file a response, including opposing affidavits or depositions. The adverse party may serve opposing affidavits, and if such opposing affidavits are served, the opposing affidavits and any memorandum in support thereof shall be served pursuant to Article 1313 at least eight days prior to the date of the hearing unless the Rules for Louisiana District Courts provide to the contrary. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law.

C. (1) After adequate discovery or after a case is set for trial, a motion which shows that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law shall be granted.

(2) The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact.

D. The court shall hear and render judgment on the motion for summary judgment within a reasonable time, but in any event judgment on the motion shall be rendered at least ten days prior to trial.

E. A summary judgment may be rendered dispositive of a particular issue, theory of recovery, cause of action, or defense, in favor of one or more parties, even though the granting of the summary judgment does not dispose of the entire case.

Procedure.[26] This Court has the jurisdiction and authority to reinstate the summary judgment if there are no genuine issues of material fact and that petitioners are entitled to a judgment as a mater of law; *Board of Education, Island Trees Union Free School District No. 26 v. Pico,* 457 U.S. 853 (1982) at 863.[27] And although this is essentially an appeal of an interlocutory ruling, the granting of the summary judgment by the trial court had put an end to the litigation as between all parties. The summary judgment process, both LSA-C.C.P. Art. 966 and Rule 56(c) of the Federal Rules of Civil Procedure is designed to allow for the quick and efficient disposal of claims where proof is insufficient to warrant trials on the merits. This is an opportunity to further the cause of judicial efficiency. All lower courts applying principals of admiralty should be given necessary guidance by setting forth the bright line delineation that "post-accident" employment related activities *are not* to be considered in determining "seaman status."

In that regard, there is no cleaner case for this Court to set forth the bright line rule of law, that *Desper* and *Aguilar v. Standard Oil* and the long line of jurisprudence that followed, were not modified by *Chandris*, i.e. that *Chandris* did not intend to imply that stepping away from the "snapshot" view of seaman status was tantamount to approv-

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[26] See *Hardy v. Bowie*, 744 so.2d 606 (La. 1999); *Independent Fire Insurance Company v. Sunbeam Corporation*, 755 So.2d 226 (La. 2000); *Hayes v. Autin*, 685 So.2d 691 (La.App. 3 Cir. 1996).

[27] See also *City of New Orleans v. Dukes*, 427 U.S. 297 (1976); and City of Los Angeles v. David, 538 U.S. 715 (2003).

ing a new and expansive interpretation that "status" is to be determined at any other time, other than by viewing the historical nature of the employee's basic job assignment at the time of injury. As there are no genuine issues of material fact that on the date of injury, Thomas Lovejoy did not have any employment related connection to a vessel or fleet of vessels in navigation, other than the sporadic and transitory requirement of riding in a boat, i.e. "water taxi", to get to a land-based job site, the decision of the Louisiana Third Circuit Court of Appeal was erroneously based upon a misstatement of federal admiralty law and creates a conflict with the many decisions of this and other appellate courts.

CONCLUSION

This petition for a writ of certiorari should be granted and after due proceedings, the decision of the Louisiana Third Circuit Court of Appeal should be reversed thereby reinstating the summary judgment, granted by the trial court, dismissing the plaintiff's Jones Act claims with prejudice.

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APPENDIX A

Judgment rendered December 10, 2003
Applications for rehearing may be filed within the delays allowed by La. Code Civ. P. art 2166 or La. Code Crim. P. art. 922.

STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT

03-862

THOMAS LOVEJOY

VERSUS

HARDIE BERGEAUX AND CRAIN BROTHERS, INC.

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APPEAL FROM THE
FOURTEENTH JUDICIAL DISTRICT COURT
PARISH OF CALCASIEU, NO. 2001-3295
HONORABLE PATRICIA MINALDI,
DISTRICT COURT JUDGE

****

ULYSSES GENE THIBODEAUX
JUDGE

****

Court composed of Ulysses Gene Thibodeaux, Oswald A. Decuir, and Jimmie C. Peters, Judges.

REVERSED AND
REMANDED FOR
TRIAL ON THE MERITS.

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THIBODEAUX, Judge.

In this maritime case, the defendant-appellee, Crain Brothers, Inc. (Crain Brothers), filed a motion for summary judgment and asserted that the plaintiff-appellant, Thomas Lovejoy (Mr. Lovejoy), was not a seaman and should be precluded from bringing a claim under the Jones Act. The trial court granted the defendant's motion for summary judgment after concluding that there were no genuine issues of material fact as to the plaintiff's status as a seaman. We disagree. We reverse and remand to the trial court for a trial on the merits.

1.
ISSUES

We shall address:

1) whether post-accident employment activities are relevant in determining seaman status; and,

2) whether the trial court erred in granting a summary judgment to the employer defendant and in dismissing plaintiff's claims under the Jones Act.

II.
FACTS

In March 2005, Crain Brothers started its Sunland project, which involved placing pipeline crossings under the intracoastal waterway, the Sabine River, and the

Vinton Canal. In June 2000, Crain Brothers hired Mr. Lovejoy to perform welding services on this project. Mr. Lovejoy was required to pass a welding exam in June but did not start work on the project until July 5, 2000. Mr. Lovejoy worked with Crain Brothers on a previous project in 1995 as a welder on an offshore platform.

The Sunland project involved use of many types of boats including tugs, marshbuggies, and aluminum flatboats. The M/V MISS HILDA transported the workers, welding machines, sandblasting equipment, welding leads, and all other equipment needed to complete the project down the intracoastal waterway to the crossing site on a daily basis. The duration of the trip was anywhere between 30-45 minutes. Once at the site, the workers would pull the vessel up close to the bank and a marshbuggy machine, equipped with pontoons, would be used to offload the equipment onto another pontoon barge.

The waterway crossing construction consisted of welding the pipe together, one joint at a time. After welding, the workers moved the pipes along an assembly line where they were x-rayed, sandblasted, doped and jeeped. As each joint was completed, the string of welded pipe was pulled out into the marsh by a marshbuggy, far enough for another joint of pipe to be welded into the line. The final step was to weld a cap on it, pressure test it, and then install a pull cap on the end nearest the canal so that the line could be pulled through a hole that was bored underneath the waterway.

On July 8, 2000, Mr. Lovejoy was injured when a co-employee dropped a bucket on his head. The injury

occurred on a levee, when the pipelines were being welded together. Though injured, he was released from the hospital and went back to his job a few days later. He continued to work on the project performing various tasks such as driving boats, transporting equipment, and fabrication welding until July 29, 2000. During his entire employment on this project, Mr. Lovejoy worked on **the M/V MISS HILDA,** the tugs, barges, marshbuggies and aluminum flatboats. He estimated that he piloted the M/V MISS HILDA to the job site about seven times during his work on the project and stayed on it all day long on some days.

Mr. Lovejoy filed suit against Crain Brothers and his co-worker, Hardie Bergeaux[1] under various theories including Jones Act, maintenance and cure, and unseaworthiness. He later amended his lawsuit to assert a claim against Zurich American Insurance Company. Crain Brothers filed a motion for summary judgment on the issue of seaman status. The trial court granted Crain Brothers' motion for summary judgment ruling that there were no genuine issues of material fact. Thereafter, this appeal was filed.

III.
LAW AND DISCUSSION

Standard of Review

"Appellate courts review summary judgments *de novo* under the same criteria that govern the district court's consideration of whether summary judgment is

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[1] Hardie Bergeaux filed an exception of no cause and/or no right of action and the exception was granted. No appeal was taken by Mr. Lovejoy.

appropriate." *Reynolds v. Select Properties, Ltd.*, 93-1480, p. 2 (La. 4/11/94), 634 So.2d 1180, 1183; *Leger v. La. Med. Mut. Ins. Co.*, 98-1098, p. 4 (La.App. 3 Cir. 3/31/99), 732 So.2d 654, 657, *writ denied*, 99-1253 (La. 6/18/99), 745 So.2d 30. Stated differently, this court "asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether there is any genuine issue of material fact, and whether the mover-appellant is entitled to judgment as a matter of law." *Labbe v. Chem. Waste Mgmt., Inc.*, 00-1772, p. 4-5 (La.App. 3 Cir. 5/2/01), 786 So.2d 868, 872, *writ denied*, 01-1602 (La. 9/14/01), 796 So.2d 685 (quoting *Smith* v. *Our Lady of the Lake Hosp., Inc.*, 93-2512, p. 26 (La. 7/5/94),639 So.2d 730, 750).

Because this is a summary judgment case to which La.Code Civ.P. art. 966 *et seq. is* applicable, it is necessary to first determine who will bear the burden of proof at trial. Subpart (C)(2) of La.Code Civ.P. art. 966 explains:

> The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact.

The Jones Act, 46 U.S.C.App. § 688(a), mandates that "[a]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law...." While the Act affords an injured seaman the right to maintain an action, it is silent as to the definition of "seaman." The Act "therefore leaves to the courts the determination of exactly which maritime workers are entitled to admiralty's special protection." *Chandris, Inc. v. Latsis,* 515 U.S. 347, 355, 115 S.Ct. 2172, 2183 (1995).

In keeping with the jurisprudential development of admiralty law, Mr. Lovejoy has the burden of proving the elements of a twofold, conjunctive test for seaman status. "First, . . . 'an employee's duties must "contribute to the function of the vessel or to the accomplishment of its mission."' . . . Second, . . . a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in term of both its duration and its nature." *Chandris,* 515 U.S. at 368, 115 S.Ct. at 2190 (citation omitted); *Roberts v. Cardinal Services.,* 266 F.3d 368, 374 (5th Cir. 2001), *cert. denied,* 535 U.S. 954, 122 S.Ct. 1357 (2002).

Because Crain Brothers is the movant and it is not to bear the burden of proof at trial on seaman status under the Jones Act, it is not required to negate all essential elements of Mr. Lovejoy's claims. The company must show an absence of factual support for one or more elements essential to Mr. Lovejoy's claims. If Crain Brothers is able to do this, then the burden of production shifts to Mr. Lovejoy to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If Mr. Lovejoy successfully produces such support, then there is a genuine issue of material fact.

In a Jones Act case, the determination of seaman status is a mixed question of law and fact. *Harbor Tug and Barge Co. v. Papai,* 520 U.S. 548, 117 S.Ct. 1535 (1997). If reasonable persons could reach only one conclusion as to a particular factual issue, then such issue is not genuine and may be disposed of summarily. However, if reasonable persons could disagree as to a factual issue's resolution, then such an issue is genuine, and trial on the merits is warranted. *Sumner v. Sumner,* 95-677 (La.App. 3 Cir. 11/8/95), 664 So.2d 718, *writ denied,* 95-2919 (La. 2/9/96), 667 So.2d 531.

Mr. Lovejoy's Seaman Status Under the Jones Act

As noted above, the test for seaman status is twofold and conjunctive. "First, . . . 'an employee's duties must "contribute to the function of the vessel or to the accomplishment of its mission."' . . . Second, . . . a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature." *Chandris,* 515 U.S. at 368, 115 S.Ct. at 2190 (citation omitted). *See also Harbor Tug,* 520 U.S. at 554,117 S.Ct. at 1540; *Roberts,* 266 F.3d at 374. Each prong must be considered in turn.

The first prong of this fact-intensive test is a broad threshold inquiry. Typically, it is easily satisfied, and a maritime employee who does the ship's work falls within the purview of the Jones Act. Indeed, "[a]ll who work at sea in the service of a ship" are potential seamen. *Chandris,* 515 U.S. at 368, 115 S.Ct. at 2190 (quoting *McDermott Int'l, Inc. v. Wilander,* 498 U.S. 337, 354, 111 S.Ct. 807, 817 (1991)). *See also Hufnagel v. Omega Serv. Indus., Inc.,* 182 F.3d 340,

347 (5th Cir. 1999). It is neither necessary for the maritime worker to aid in navigation nor to participate in actual transportation of the vessel in order to satisfy the first prong. *Little v. Amoco Prod. Co.*, 98-1130 (La.App. 1 Cir. 5/14/99), 734 So.2d 933, *writ denied*, 99-1752 (La. 10/l/99), 748 So.2d 446; *Wilander*, 498 U.S. 337, 111 S.Ct. 807. Mr. Lovejoy was employed by Crain Brothers as a welder. His duties included loading equipment for the project onto the vessel. In addition, he piloted the vessel after his injury. Thus, given the broad interpretation of the first prong of the *Chandris* test, it is likely that a jury could find Mr. Lovejoy contributed to the function of the vessel or to the accomplishment of its mission, which was to transport the workers and equipment to the welding site.

The second or "substantial connection" prong of the test is often the determinative one. It consists of both temporal and functional elements, which is to say that the focus is on the substantiality of the connection to a vessel or identifiable group of vessels. The connection must be substantial in terms of both duration and nature. The Supreme Court in *Chandris* stated that "[a] maritime worker who spends only a small fraction of his working time on board a vessel is fundamentally landbased and therefore not a member of the vessel's crew, regardless of what his duties are." *Chandris*, 515 U.S. at 371, 115 S.Ct. at 2191. The Court went on to state:

> A worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act.. This figure of course serves as no more than a guideline established by years of experience, and departure

> from it will certainly be justified in appropriate cases. . . . And where undisputed facts reveal that maritime worker has a clearly inadequate temporal connection to vessels in navigation, the court may take the question from the jury by granting summary judgment or, a directed verdict.

Chandris, 515 U. S. at 371, 115 S.Ct. at 2191.

There are genuine issues of material fact regarding whether the "substantial connection" prong of the *Chandris* test is satisfied. Before his injury, Mr. Lovejoy rode the vessel to work on a daily basis; however, most of his welding duties were performed on a levee. After his accident, Mr. Lovejoy spent a substantial part of his time on the M/V MISS HILDA and other boats and performed additional tasks such as piloting the M/V MISS HILDA.

The first criterion involves a consideration of the time spent by Mr. Lovejoy on a vessel in navigation. Crain Brothers argues that Mr. Lovejoy only rode a vessel on water on the way to the actual job site and spent less than 30% of his time on water. Crain Brothers, estimates that he spent 37 hours on a vessel, out of 245 hours worked. On the other hand, Mr. Lovejoy estimates that he spent at least 43% of his time on a vessel. His figure shows that he spent 82.7 hours of approximately 192 hours worked on a vessel.

Another issue is whether the area in which Mr. Lovejoy performed his work was a navigable body of water. Crain Brothers argues that the marsh where Mr. Lovejoy worked was not a navigable body of water. Mr. Lovejoy

counters that the project involved marsh machines and that the welding machines and equipment were on barges which were pushed by tugboats, thus making the area a navigable body of water.

In its opinion, the trial court stated:

> The plaintiff contends that this Court should examine the duties to which he was assigned after his injury and that the Court should not rely on a "snapshot" of what job the plaintiff was performing at the exact time of his injury. All existing cases acknowledge that activities up to and including the time of injury should be included in the examination. The plaintiffs attempt to stretch this rationale to include his activities after his injury requires a leap of logic which would subvert the purpose of the Jones Act. This would allow someone who had no connection with Jones Act activities who was injured on the job to retroactively claim Jones Act status if he were assigned to a seaman's duties after his injury. Such an analysis would lead to absurd results unintended by the Jones Act and general maritime law.

Mr. Lovejoy suggests, and we agree, that the trial judge neglected to consider the claimant's time after his injury in determining seaman status. "[S]eaman-status is determined by the employee's *entire* employment-related connection to a vessel, [or fleet of vessels] and not by the immediate circumstances or location of the plaintiff's injury." *Hufnagel,* 182 F.3d at 346. (Emphasis supplied). *See also~Chandris,* 515 U.S. at 363, 115 S.Ct. at 2187. The

Chandris court stated that "courts should not employ 'a "snapshot" test for seaman status, inspecting only the situation as it exists at the instant of injury; a more enduring relationship is contemplated in the jurisprudence.'" *Chandris*, 515 U.S. at 363, 115 S.Ct. at 2187. Although the court in *Chandris* did not specifically state that post-accident activities can be included in determinating seaman status, we can infer this from the facts of the case. In *Chandris*, the employee was injured and returned to work on the vessel. The court considered the time the employee spent on the ship after the accident, while the vessel was in drydock, in determining that the employee was a seaman.

Chandris also addresses the issue of retroactive determination of seaman status by providing an exception to the general rule that an employee's entire employment should be considered in determining seaman status. *Chandris* provides:

> When a maritime worker's basic assignment changes, his seaman status may change as well ... For example, we can imagine situations in which someone who had worked for years in an employer's shoreside headquarters is then reassigned to a ship in a classic seaman's job that involves a regular and continuous, rather than intermittent, commitment of the worker's labor to the function of the vessel. Such a person should not be denied seaman status if injured shortly, after the reassignment, just as someone actually transferred to a desk job in the company's office and injured in the hallway should not be entitled to claim seaman status on the basis of prior service at sea. If a maritime employee receives a new work assignment

> in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new position ... While our approach maintains the status-based inquiry this Court's earlier cases contemplate, we recognize that seaman status also should not be some immutable characteristic that maritime workers who spend only a portion of their time at sea can never attain.

Chandris, 515 U.S. at 372, 115 S.Ct. at 2190.

Based on the totality of the circumstances of Mr. Lovejoy's employment, including his time spent on the vessel after his injury, we do not find this to be a case where "undisputed facts reveal that a maritime worker has a clearly inadequate temporal connection to vessels in navigation, [where] the court may take the question from the jury by granting summary judgment or a directed verdict." *Chandris,* 515 U.S. at 371, 115 S.Ct. at 2191. When the facts are analyzed against the backdrop of the jurisprudence, we believe that a reasonable jury could conclude that Mr. Lovejoy spent more than 30 percent of his employment time aboard vessels owned or controlled by Crain Brothers. Consequently, seaman status remains a genuine issue of material fact in this case.

IV.

CONCLUSION

For the reasons assigned, the trial court judgment appealed from is reversed and set aside insofar as it grants summary judgment declaring no genuine issue of material fact as to Mr. Lovejoy's seaman status as contemplated by the Jones Act and the jurisprudence interpreting said Act.

REVERSED AND REMANDED FOR TRIAL ON THE MERITS.

APPENDIX B

The Supreme Court of the State of Louisiana

THOMAS LOVEJOY

vs. No. 2004-C-0013

HARDIE BERGEAUX AND CRAIN BROTHERS, INC.

IN RE: Zurich American Ins. Co.; Crain Brothers Inc.; Defendant(s); Applying for Writ of Certiorari and/or Review, Parish of Calcasieu, 14th Judicial District Court Div. E, Nos. 01-3295; to the Court of Appeal, Third Circuit, No. 03-862 NO. 2004-C-0013

March 19, 2004

Denied. May re-urge the issue in the event of an adverse judgment.

JLW

PFC

CDK

BJJ

JTK

VICTORY, J., would grant the writ.
TRAYLOR, J., would grant the writ.

Supreme Court of Louisiana
March 19, 2004

/s/ illegible
Deputy Clerk of Court
For the Court

APPENDIX C

THOMAS LOVEJOY	14TH JUDICIAL DISTRICT COURT
VS. #01-3295	PARISH OF CALCASIEU
HARDIE BERGEAUX, ET AL	STATE OF LOUISIANA

FILED:_____ _____
DEPUTY CLERK

OPINION

This matter came before the Court on the defendants' Motion for Summary Judgment regarding the plaintiff's seaman status and his right to assert claims under the Jones Act and/or general maritime law.

"The Jones Act ... does not define the term "seaman" and therefore leaves to the courts the determination of exactly which maritime workers are entitled to admiralty's special protection." ***Chandris. Inc. v. Latsis,*** 515 U.S. 347 (1995). It is also important to note that "[a]n employee need not perform traditional maritime activities to be considered a seaman." **Buford v. Cardinal Services,** 801 So.2d 1269 (3rd Cir. 2001).

The essential requirements for seaman status were reiterated in ***Chandris*** supra.
A plaintiff is a seaman if:

1) an employee's duties contribute to the function of the vessel or to the accomplishment of its mission, and

2) a seaman has a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration)and its nature.

"[I]t is neither necessary for the maritime worker to aid in navigation nor to participate in actual transportation of the vessel in order to satisfy the first prong." ***Buford*** supra.

While, the second prong of the ***Chandris*** test is intended "to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation." As such, the ***Chandris*** court specifically held:

> [T]he total circumstances of an individual's employment must be weighed to determine whether he had a sufficient relation to the navigation of the vessels and the perils attendant thereon. The duration of the workers connection to a vessel and the nature of the worker's activities taken together, determine whether a maritime employee is a seaman because the ultimate inquiry is whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time.

> A worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act. This figure of course serves as no more than a guideline established by years of experience, and departure from it will certainly be justified in appropriate cases.

The plaintiff contends that this Court should examine the duties to which he was assigned after his injury and that the Court should not rely on a "snapshot" of what job the plaintiff was performing at the exact time of his injury. All existing cases acknowledge that activities up to and including the time of injury should be included in the examination. The plaintiff's attempt to stretch this rationale to include his activities after his injury requires a leap of legal logic which would subvert the purpose of the Jones Act. This would allow someone who had no connection with Jones Act activities who was injured on the job to retroactively claim Jones Act status if he were assigned to a seaman's duties after his injury. Such an analysis would lead to absurd results unintended by the Jones Act and general maritime law.

Without inclusion of the plaintiff's activities subsequent to his injury in the computation of his "service of a vessel in navigation," the percentage falls far below the 30 percent guideline established in ***Chandris***. Furthermore, no circumstances exist to justify, in any way, departure from this guideline. In making this determination, this Court has not considered the eight hours credited to him on June 26, 2000, during the administration of his welding test from July 5, 2000, through the time of injury on July 8, 2000. The plaintiff's activities establish him as a land-based worker who had

only a transitory or sporadic connection to a vessel or group of vessels in navigation.

Motion for Summary Judgment is granted. Costs are assessed to plaintiff.

THUS DONE AND SIGNED this 30th day of April, 2003.

/s/ Patricia Minaldi
PATRICIA MINALDI
DISTRICT JUDGE

APPENDIX D

THOMAS LOVEJOY	:	**14th JUDICIAL DISTRICT COURT**
VS. #01-3295	:	**PARISH OF CALCASIEU**
HARDIE BERGEAUX and CRAIN BROTHERS, INC.	:	**STATE OF LOUISIANA**

JUDGMENT

This matter came before the Court on the defendants' Motion for Summary Judgment with regard to the plaintiff's seaman status and his right to assert claims under the Jones Act and/or the General Maritime Law. After briefs were submitted on the issue, a hearing was held on March 18, 2003. Thereafter, the Court took the matter under advisement.

The Court having considered the law, arguments of counsel and the respective briefs filed in this matter, the Court issued an Opinion on April 30, 2003. In accordance with that opinion,

IT IS ORDERED, ADJUDGED AND DECREED that there be Judgment in the favor of defendants, Crain Brothers, Inc. and Zurich American Insurance Company against plaintiff, Thomas Lovejoy. The Court grants defendants' Motion for Summary Judgment. Accordingly, all claims maintained by Plaintiff are dismissed with prejudice.

IT IS FURTHER ORDERED that costs be assessed to plaintiff.

THUS DONE AND SIGNED this 7th day of May, 2003.

/s/ Patricia Minaldi
PATRICIA MINALDI
DISTRICT JUDGE

Filed 5-8-2003

APPENDIX E

46 App. USCA § 688
46 App. U.S.C.A. § 688

→ § 688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) Limitation for certain aliens; applicability in lieu of other remedy

(1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure or for damages for the injury or

death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred--

(A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of off-shore mineral or energy resources -- including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and

(B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person--

(A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a

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46 App. USCA § 688
46 App. U.S.C.A. § 688

remedy is sought maintained citizenship or residency.

46 App. U.S.C.A. § 688,46 App. USCA § 688

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